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No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, JAMES UCCI, and
WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE *AMICI CURIAE* IMAM JAMIL ABDULLAH AL-AMIN, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, COUNCIL OF MASAJID, ISLAMIC CENTER OF WASHINGTON, D.C., ISLAMIC FEDERATION, ISLAMIC SOCIETY OF NORTH AMERICA, IMAM WARITHUDDIN MUHAMMAD, MUSLIM WORLD LEAGUE AND NATIONAL ISLAMIC ALLIANCE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES.....		iii
INTERESTS OF THE AMICI CURIAE....		1
STATEMENT.....		5
SUMMARY OF THE ARGUMENT.....		16
ARGUMENT.....		18
POINT I.	THE OBSERVANCE OF JUM'AH SHORTLY AFTER NOON ON FRIDAYS IS A CENTRAL AND OBLIGATORY MUSLIM RELIGIOUS PRACTICE.....	18
POINT II.	PETITIONERS' JUSTIFICATIONS FOR DENIAL OF RESPONDENTS' ACCESS TO JUM'AH BETRAY ETHNOCENTRIC BIAS AND INVIDIOUS DISCRIMINATION AGAINST MUSLIMS.....	38
	A. Petitioners' Policy Against Predominantly Muslim Work Details Shows Clear Bigotry Against Muslims.....	44

B. Petitioners' Determination That Preparation For A Monday-Through-Friday Work Week Is A Goal Of Rehabilitation Reflects Majoritarian And Ethnocentric Bias.... 48

C. Petitioners' Asserted Inability To Find The Resources To Permit Muslims To Attend Jum'ah, While Finding Resources To Allow Other Religious Services To Be Held, Demonstrates Invidious Bias Against Muslims. 54

D. Petitioners' Selective Sensitivity To Possible Non-Muslim Perceptions Of "Favoritism," And Insensitivity To Muslim Perceptions Of Actual Discrimination, Evidence Anti-Muslim Bias..... 57

CONCLUSION..... 64

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Cases — Page

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Cantwell v. Connecticut, 310 U.S. 296 (1940)..... 42

Castaneda v. Partido, 430 U.S. 492 (1977)..... 40

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Cruz v. Beto, 405 U.S. 319 (1972) (per curium)..... 63

Dunn v. Blumstein, 405 U.S. 30 (1972)..... 42

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)..... 41

Hernandez v. Texas, 347 U.S. 475 (1954)..... 40

Johnson v. Avery, 393 U.S. 483 (1969)..... 63

Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952)..... 35

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Reynolds v. Sims, 377 U.S. 533 (1964)..... 41

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Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)..... 39

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eds. 1983)..... 15

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Exodus..... 37

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A. Haley, Roots (1976)..... 8

J. Harris, The Story of Aaron (So Named) the Son of Ben-Ali (1896)..... 8

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*Ahmad Ibn Hanbal, Musnad Ahmad..... 24,25

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S. Poll, The Hasidic Community of Williamsburg (1969)..... 50

Qur'an..... 22

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E. Said, Covering Islam: How the Media and the Experts Determine How We See the Rest of the World (1981).... 14

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*Sunan Ibn Majah..... 25

*Sunan al-Nisa'i..... 24

*Sunan al-Tirmidhi..... 25

A. Thanvi, Bahisti Zewar (Heavenly Ornaments) (M. Saroha transl., Peshawar, 1982)..... 28

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* Quotations from authorities marked with an asterisk were translated from the Arabic by Dr. Ihsan Bagby of the Islamic Society of North America.

INTERESTS OF THE AMICI CURIAE

The amici curiae here are an Arab-American civil rights organization, American Islamic organizations, and American Muslim leaders.

The American-Arab Anti-Discrimination Committee was founded in 1980 to defend the civil rights of people of Arab descent and to promote their ethnic heritage. It is a grassroots advocacy organization based in Washington, D.C. It serves a national membership of Arab-Americans, joined by persons of all ethnic origins, who are committed to challenging defamation and discrimination wherever they occur.

The amici curiae Islamic organizations and leaders represent the majority of America's Muslims. Most of the or-

ganizations of the amici were founded in the United States, and all serve the religious, social, and educational needs of Muslims. With this as their mission, the amici are committed to asserting and protecting the right of Muslims freely to practice their religion in America.

Imam Jamil Abdullah Al-Amin is the leader of an alliance of fifteen Muslim communities, the members of which are chiefly of Afro-American heritage. Imam Al-Amin resides in Atlanta, Georgia.

The Council of Masajid is an affiliated body of over one hundred mosques and Islamic centers. Its headquarters are in New York City. It is dedicated to helping to establish and maintain Islamic houses of worship.

The Islamic Center of Washington,

D.C. is a major Islamic center founded in 1954 and governed by ambassadors from the nations of the Muslim world. It is a religious resource on Islam for American universities, Muslim communities, and other groups.

The Islamic Federation, headquartered in Washington, D.C., is an alliance of Muslim communities. Its principal purpose is to establish and support the Muslim communities of America.

The Islamic Society of North America, headquartered in Plainfield, Indiana, is a membership organization of 300 chapters. It is composed of four constituent organizations: Muslim Students' Association, Association of Muslim Social Scientists, Association of Muslim Engineers and Scientists, and Islamic Medical Asso-

ciation.

Imam Warithuddin Muhammad, the son and successor of the founder of the Nation of Islam, Elijah Muhammad, was the leader of American Muslim Mission prior to his decision to disband the organization in the interest of Islamic unification in America. He resides in Chicago, Illinois.

The Muslim World League is the United States branch of an international organization of the same name that has Observer status at the United Nations. Its primary purpose is to unify Muslims and to support existing Muslim organizations. Its offices are in New York City.

The National Islamic Alliance consists of three Muslim communities in the United States. Most of the communities'

members are of Afro-American heritage. The Alliance is dedicated to uniting American Muslim communities and serving their needs. Its headquarters are in Chicago, Illinois.

STATEMENT

The amici curiae, representing a significant proportion of all Muslims residing in the United States, submit this brief to elucidate the significant aspects and practices of Islam that this case directly affects. Consent to file this brief has been obtained from all parties, whose letters expressing such consent are lodged with the Clerk of this Court. The amici here seek both to explain the Jum'ah service's crucial role in the practice of Islam, and to respond to the contrary arguments made by the

petitioner New Jersey correctional officials and the amicus United States.

About one billion people, one-fifth of the world's population, are Muslims. In the United States, Islam has about 3,000,000 adherents. Y. Haddad, The Muslim Experience in the United States, 12 The Link 1, 2 (Sept./Oct. 1979); see also A. Muhammad, Muslims in the United States, The Islamic Impact 195, 196 (1984) and sources cited therein. There are more Muslims in the United States than there are members of the Protestant Episcopal Church or the United Church of Christ. Y. Haddad, A Century of Islam in America (American Institute for Islamic Affairs, American University, Occasional Paper No. 4) 1 (1986); see also The World Almanac and Book of Facts 335-36 (1986).

There are currently about 600 functioning mosques and other Islamic centers in the United States. Y. Haddad, A Century of Islam in America, supra, at 1. The number of American Islamic adherents grows, through immigration and the conversion of native United States citizens, at a yearly rate of three to four per cent. A. Kettani, Lecture at the University of Petroleum and Minerals, Dharham, Saudi Arabia (Jan. 24, 1977), cited in E. Lovell, Islam in the United States, The Muslim Community in the United States 93, 94 (1983). Islam has become a major American religion, and Muslims are a significant minority in this nation.

Although the rapid growth of the American Muslim community is a relatively recent phenomenon, Islam has been in

America since shortly after the European discovery of the New World. Muslims accompanied Italian, Spanish, and Portugese explorers. See Y. Haddad, The Muslim Experience in the United States, supra, at 1; B. Mehdi, The Arabs in America 1492-1977: A Chronology and Fact Book 1 (1978); N. Makdisi, The Moslems of America, The Christian Century 969-71 (Aug. 26, 1959). The slave trade brought significant numbers of captive Muslim Africans to America. A. Muhammad, Muslims in the United States, supra, at 196; see generally A. Haley, Roots (1976); J. Harris, The Story of Aaron (So Named) the Son of Ben-Ali (1896). In the late nineteenth century, the first wave of free Muslim immigrants entered the United States from Eastern Europe and the Middle

East; these immigrants created the first established Muslim communities and erected the first mosques in North America. A. Muhammad, Muslims in the United States, supra, at 197. By the end of the nineteenth century, American-born people began to convert to Islam. Contrary to popular belief, the first American converts to Islam were not poor Blacks, but middle-class and professional Caucasians; indeed, the first recorded American-born convert to Islam was the Methodist Reverend Norman, who became a Muslim in 1870. T. Arnold, The Preaching of Islam: A History of the Propagation of the Muslim Faith 465 n.1 (1961). A decade later, the United States Consul General to the Philippines, Alexander Russell Webb, converted to Islam and devoted the rest of

his life to Muslim missionary work in the United States. A. Muhammad, supra, at 197-99. By the end of World War I, Islam had established itself as an American religion, no longer confined to close-knit communities of immigrants. Various movements inspired by Islam and the teachings of its Holy Book, the Qur'an, set root in the United States. These post-war movements found many converts among the Black populations of northern industrial cities. One of the largest of these "native" Islamic movements was the Nation of Islam (popularly known as the "Black Muslims"), founded by Fard Muhammad and guided for many decades by his successor, Elijah Muhammad. Id. at 199-202; see also E. Lincoln, The Black Muslims in America 52-57 (1973).

During this period, Muslims also continued to immigrate to the United States from the Soviet Union, the Balkan States, and the Middle East, establishing new congregations. By the end of World War II, a variety of Muslim communities had settled in practically every part of the United States. Mosques and Islamic religious societies had been established in a diversity of areas, from the "Nation of Islam" mosques in Harlem and Detroit, to the "Polish" (Tatar) mosque of Brooklyn, the "Albanian" Muslim religious society at Biddeford, Maine, the "Syrian" mosque near Ross, North Dakota, and the "Lebanese" mosque in Cedar Rapids, Iowa. The Harvard Encyclopedia of American Ethnic Groups 25, 128-36, 733, 990 (1980); 12 Twentieth Century Encyclopedia of Reli-

gious Knowledge 768 (1950); Y. Haddad, The Muslim Experience in the United States, supra, at 3; 13 The Muslim World (No. 2) 82-83 (Jan. 1923); 11 The Muslim World (No. 1) 195-96 (Apr. 1921). Subsequent immigration, and rapid growth in the number of conversions to Islam after World War II, have given Islam its place of prominence among American religions.

In the past decade, members from the various strains of Islam in America have embarked on a determined program of unification. The most significant development within this trend has been the decision by Warithuddin Muhammad, Elijah Muhammad's successor as leader of the Nation of Islam, to enter the mainstream of Islam in America. The American Muslim community has ceased to be a loose agglo-

meration of mosques and disparate movements. Through the functions of the organizations of the amici, Islam in America has become the religion of one people, who worship God, who believe Muhammad to be his Prophet, and who follow the commandments set forth in the Qur'an.

Nevertheless, Muslims, free citizens and inmates alike, have historically encountered frustration when seeking to engage in the basic practices of Islam in America. Much of this results from ignorance of the nature of Islam, and negative attitudes and images projected by the media. Judeo-Christian conventions dominate the culture of North American society, as is evidenced by the general adoption of the Monday-through-Friday work week. Furthermore, negative report-

age of the unfortunate conflicts in the Middle East often contains the inaccurate conflation of the words "Muslim" and "Arab." See, e.g., E. Said, Covering Islam: How the Media and the Experts Determine How We See the Rest of the World (1981). Racial prejudice also plays a part in this problem. Most Muslim converts in the United States are Black Americans, although some 40,000 to 75,000 of them are of Caucasian European origin. Y. Haddad, A Century of Islam in America, supra, at 2, 7. As a result, Muslims frequently have been the targets of incidents of overt bigotry and intolerance that shock the conscience of citizens of a free society. Most often, however, Muslims have been constrained in their opportunities to pursue their faith by

the public's simple misunderstanding of the rudimentary tenets of Islam. See generally A. Muhammad, supra; E. Lovell, supra, at 96-101; see also B. Abu-Laban, The Canadian Muslim Community: The Need for a New Survival Strategy, The Muslim Community in North America 75, 82-84 (1983). As the Christian seminarian, Yvonne Haddad, observed,

> . . . as matters stand at present, [Muslims] see continuing inequities regarding their participation in . . . society. America's spirit of religious tolerance, which they welcome, does not equate for them to freedom of opportunity to practice their faith. In a country in which religion is so obviously valued, they experience frustration in attempting to practice their own. The American experience has molded them into citizens responsive to American ideals of freedom and equality. Increasingly, they can be expected to hold their country accountable to those same ideals, as applied to

them.

A Century of Islam in America, supra, at 1. The amici submit this brief in the hope that the Muslim's basic religious need to participate in congregational Jum'ah may be clarified.

SUMMARY OF THE ARGUMENT

This case affects the right of minimum-security Muslim inmates to participate in the Jum'ah Prayer, despite prison policies forbidding it. The Qur'an and 1400 years of Islamic scholarship show that attendance at Jum'ah is obligatory, and the service must be held at its ordained time just after noon on Fridays. Petitioners' assertion that Muslims may miss the Jum'ah service, or move Jum'ah to an administratively more convenient time or day is a doctrinally incorrect

and constitutionally inappropriate interference in religious matters.

The Equal Protection Clause of the Fourteenth Amendment directs that the petitioners' practices and policies abridging the Muslim inmates' right to worship must be strictly scrutinized. The petitioners' arguments and practices, set forth in the record of this case, plainly show petitioners' irrational hostility toward Islam and their invidious bias against Muslim inmates. Such hostility and bias further underscore the need to strictly scrutinize petitioners' denial of the right to attend Jum'ah. Under the appropriate analysis, the denial of respondents' right to attend Jum'ah is unconstitutional.

ARGUMENT

POINT I

THE OBSERVANCE OF JUM'AH SHORTLY AFTER NOON ON FRIDAYS IS A CENTRAL AND OBLIGATORY MUSLIM RELIGIOUS PRACTICE

In the case before this Court, the respondents, Ahmad Uthman Shabazz and Sadr-ud-Din Nafis Mateen, were Muslim inmates incarcerated at the New Jersey state prison at Leesburg (LSP). They sued to protect their right to attend the weekly congregational service of the Islamic faith, called Jum'ah. Jum'ah is held on Fridays between noon and Asr, the mid-afternoon prayer. At LSP, Muslim inmates had been able to attend Jum'ah this for a number of years. When LSP officials promulgated new prison regulations in 1984, respondents and others similarly situated were forbidden to attend

Jum'ah.[1/]

Jum'ah (which means "Friday" in Arabic) is comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects. Shabazz v. O'Lone, 595 F. Supp. 928, 930 (D.N.J. 1984). Like Judaism's Sabbath service and Catholicism's Sunday Mass, the Jum'ah Prayer is of primary importance to Muslims. It is the only time in the week that all Muslims come together. Like the Jewish and Christian services, the service consists of congregational prayer and a religious sermon

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1/ Petitioners do not contend that Islam is not a bona fide religion, nor that the respondents were insincere in their adherence to Islam or in their expressed desire to follow its commandments. Shabazz v. O'Lone, 595 F. Supp. 928, 929 (D.N.J. 1984) ("There is no question as to the sincerity of the religious beliefs of either plaintiff.").

("Khutbah").

The central importance of Jum'ah to Muslims is ordained in Islam's basic scriptures. The Prophet of Islam, Muhammad (d. 623 C.E.), said:

> We who are the last shall be the first on the Day of Resurrection, except that every Religious Nation [i.e., the Christians and Jews] were given the Book before us and we given it after them. It was this day [Friday] which God prescribed for us and guided us to it and the people came after us with regard to it, the Jews observing the next day [Saturday] and the Christians the day following that [Sunday].

Sahih al-Bukhari 2:1 (M. Khan transl., Riyad, n.d.); Sahih Muslim 2:405 (M. Ashraf transl., Lahore, 1973).

Jum'ah Prayer is an essential part of Islamic religious life, as evidenced by the fact that Jum'ah Prayer is obligatory. All Muslim scholars agree on the

obligation of Jum'ah Prayer. The Muslim scholar Sayyid Sabiq states:

> The scholars agree that Jum'ah Prayer is an obligation on each individual Muslim and that it is two rak'ah [prayer cycles], based on the saying of God [in the Qur'an], "O you who believe, when the call to prayer is proclaimed on Friday, hasten to the rememberance of God and leave off business" [Qur'an 62:9].

1 Fiqh al-Sunnah 301 (Dar al-Kitab al-Arabi, Beirut, n.d.).[2/]

The famous Muslim thinker Ibn Rushd (Averroes) says, "In regards to the obligation of Jum'ah Prayer on each individual Muslim, the vast majority hold this opinion." 1 Bidayat al-Mujtahid 113 (Dar

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2/ Where no published English translations of Islamic scripture and scholarly works are available, translation from the Arabic originals has been made by Dr. Ihsan Bagby of the Islamic Society of North America, who also provided Islamic scholarship.

al-Fikr, Beirut, n.d.). Abd al-Rahman al-Jaziri, in his work comparing the opinions of the Muslim legal scholars, says, "Consensus has formed that Jum'ah Prayer is an obligation on every individual Muslim." 1 al-Fiqh ala al-Madhabib al-Arba'ah 375 (Ihya' al-Turath al-Arabi, Beirut, n.d.).

These three authors point out that the primary proof for the obligation of Jum'ah Prayer is the verse in the Qur'an:

> O you who believe, when the call to prayer is proclaimed on Friday, hasten to the remembrance of God and leave off business. That is best for you if you but knew. And when the prayer is finished, then you may disperse through the land and seek God's bounty.

Qur'an 62:9-10.

In his commentary on this verse, Ibn Kathir has said:

> God has ordered the believers

> to gather on Friday in order to worship Him, for He has said, "when the call to prayer is proclaimed on Friday, hasten. . . ." "Hasten" means proceed to, go to, concern yourself with getting to it. "Hasten" does not mean walk hurriedly.

3 Mukhtasar Tafsir Ibn Kathir 500 (Dar al-Qur'an al-Karim, Beirut, 1971).

Al-Qurtubi, in his famous commentary, states:

> God has made Jum'ah Prayer obligatory on every Muslim. . . . The vast majority of the nation of Muslims and the scholars hold the view that it is obligatory on individuals, and this is based on the verse, "O you who believe, when the call to prayer is proclaimed on Friday. . . ."

18 al-Jami li-Akham al-Qur'an 105 (Dar al-Kitab al-Arabi, Cairo, 1971).

Al-Qurtubi comments that there is no disagreement among the scholars that the phrase, "when the call to prayer on Fri-

day is proclaimed," refers to the call to prayer for the Jum'ah Prayer on Friday, id. at 100, and that the phrase "remembrance of God" refers to the prayer and the sermon, which constitute the Jum'ah Prayer. Id. at 107.

The obligation of Jum'ah Prayer is also established by the sayings of the Prophet. It is reported that the Prophet, upon being told of a certain people who did not attend Jum'ah Prayer, angrily said:

> Let such people who do not attend Jum'ah Prayer change their ways or God will set a seal on their hearts and they will become among the unmindful.

Sahih Muslim, supra, 2:410; (1973); Sunan al-Nisa'i (Jum'ah hadith no. 2); Ahmad Ibn Hanbal, 1 Musnad Ahmad (hadith nos. 235, 239 & 254); 1 Mishkat al-Masabih 288

(J. Robson transl., Lahore, 1963). Al-Qurtubi has called this tradition of the Prophet "a clear proof for the obligation of Jum'ah Prayer." 18 al-Jami li-Akham al-Qur'an, supra, at 105. It is also reported that the Prophet said:

> Whoever misses three successive Jum'ah prayers, God will place a seal on his heart.

Sunan al-Tirmidhi (Jum'ah, hadith no. 7); Sunan Abu Dawud (Salah, hadith nos. 203 & 204); Sunan Ibn Majah (Salah, hadith no. 93); 1 Musnad Ahmad (hadith nos. 402, 450, 461, 466 & 489). The Prophet also said:

> I had an urge to ask someone to lead the prayer so that I could burn down the houses of those who do not attend Jum'ah Prayer.

1 Musnad Ahmad (hadith nos. 394, 402, 422, 449 & 461); 1 Mishkat al-Masabih,

supra, at 289.

The only excuse for a Muslim man not to attend Jum'ah Prayer is sickness. This is based on the saying of the Prophet:

> Jum'ah Prayer is an obligation on every Muslim in a community except four: a slave, a woman, a minor child, and a sick person.

1 Mishkat al-Masabih, supra, at 288.

Muslims are required to leave their businesses and work in order to attend Jum'ah Prayer. The Qur'anic verse quoted above says, "leave off business." Concerning this passage, Al-Qurtubi says, "God prohibits it [business] during the time of Jum'ah Prayer." 18 al-Jami li-Akham al-Qur'an, supra, at 107. Ibn Kathir states: "Because of this [verse], the scholars agree on the unlawfulness of

business after the second call to prayer for Jum'ah." 3 Mukhtasar Tafsir Ibn Kathir, supra, at 501. Abd al-Rahman al-Jaziri says: "When the call to prayer is made, just before the sermon, business is prohibited." 1 al-Fiqh ala al-Madhabib al-Arba'ah, supra, at 376. The famous jurist of the second generation Ata said, "All types of work are forbidden [at the time of Jum'ah]." Sahih al-Bukhari, supra, 2:14.

Muslim scholars agree that, because Jum'ah Prayer is an obligation, failure to attend Jum'ah Prayer is disobedience to God and a sin. The logic is that attending Jum'ah Prayer is a command and disobeying a command is culpable. In Islam a sin is a deed that incites God's anger and forms part of a person's record

for which he is judged in the Hereafter.

The modern Muslim scholar Ashraf Ali Thanvi has written:

> Once someone asked Ibn Abbas [a companion of the Prophet] that a man who did not attend the congregation of Friday has died, what would he [Ibn Abbas] say about him. Ibn Abbas replied that he was in Hell. Then the same man continued to ask him the same question continuously for one month and every time the reply was the same. Thus traditions have clearly indicated that the Shariat [Islamic Law] has greatly stressed the importance of Friday prayer, and also very grave warnings have come for those who deliberately neglect it. In view of these, can anyone claiming to be Muslim dare to neglect this Farz [obligation] of Islam?

Bahisti Zewar (Heavenly Ornaments) 220 (M. Saroha transl., Peshawar, 1982).

Friday is a special day for the Muslim and the Muslim community. The Prophet has called Friday "the best [day] on

which the sun has risen." Sahih Muslim, supra, 2:405. The Muslims take off from work and come together at a specific time to worship as one body.

Jum'ah Prayer can be made only on Friday afternoon from the time the sun has passed its zenith until it reaches the mid-point of its decline. The practice of the Prophet and his companions was to start Jum'ah Prayer when the sun started its decline -- in other words immediately after noon. Sayyid Sabiq states:

> The vast majority of the Companions of the Prophet and the generation after the Companions have taken the view that the time for Jum'ah is the time of the noon prayer.

1 Figh al-Sunnah, supra, at 214. The proof of this view is the tradition in the collection of al-Bukhari:

> Anas b. Malik [a companion of the Prophet] reported that the Prophet used to offer the Jum'ah immediately after mid-day.

Sahih al-Bukhari, supra, 2:12.

All Muslim scholars, therefore, agree that the Jum'ah Prayer has been ordained for a specific time (Friday, noon to mid-afternoon), and therefore it cannot be substituted or switched to another time. Ibn Rushd calls Jum'ah Prayer a "substitute" for the noon prayer (Zuhr).[1]

Jum'ah Prayer is necessarily a congregational prayer. The custom during the time of the Prophet Muhammad and the early Muslims was for the Muslims in each town to come together in one place to pray Jum'ah. On this basis, Muslim scholars agree that it is best for Muslims to

1 Bidayat al-Mujtahid, supra, at 113.

gather in the biggest congregation and the largest mosque. In light of this, the translator of Sahih Muslim, Abdul Hamid Siddiqi, writes in the chapter on Jum'ah:

> We have already explained that Islam exhorts its followers to make their social life a visible expression of God-consciousness. Prayer is the most effective means of fostering this virtue in man. That is the reason why it has been made essential for the Muslims to observe obligatory prayers in congregation. Jum'ah is a step forward in this respect. The purpose behind it is to provide opportunities to the greater number of Muslims to attend larger congregations in the mosques in an atmosphere of religious piety. Apart from prayer, the sermon has also been made an integral part of the Jum'ah Prayer. The Imam [prayer leader] delivers the sermon and instructs people in religion. He explains to them the day-to-day problems in the light of Islam.

Sahih Muslim, supra, 2:402 (commentary).

In the spirit of this special day, the Prophet has advised Muslims to prepare themselves for the prayer by taking a bath, wearing their best clothes, and using scents and perfume. They are to listen carefully to the sermon and after the sermon they are to pray as one body.

It should be obvious from this discussion that Jum'ah Prayer plays a central role in the lives of Muslims. It is a special time in which Muslims assert their identity as a community covenanted to God. To deny a Muslim the right to make Jum'ah Prayer is to deny him an essential part of his religion.

Although petitioners and their supporting amici concede that belief in the tenets of Islam require respondents and other Muslims to attend Jum'ah between

noon and mid- afternoon on Fridays, Brief for the Petitioners at 5; Brief for the United States at 3, petitioners suggest that, these tenets notwithstanding, Jum'ah services may be switched to a new time or day, in deference to the considerations of administrative convenience. Indeed, the LSP administration suggested to Imam Haamid Abduh, the Muslim spiritual leader who ministers to LSP's inmate population, that he switch the service to another time at the conclusion of the workday. Brief for Petitioners at 13, 17. The petitioners also suggest that the Imam's visits to LSP on Wednesday and Friday evenings gives LSP's Muslim population sufficient time to celebrate Jum'ah. Brief for the Petitioners at 17; Brief for the United States at 7.

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Additionally, the amicus United States seems to argue that it is not a significant violation of the tenets of Islam to miss Jum'ah. The United States apparently bases this particular argument on a judgment made by the LSP administration as to the meaning and import of Islamic scriptures. See, e.g., Brief for the United States at 6 ("Chief Ucci even consulted Muslim religious references. . . . After studying the matter, the administrators concluded that a policy banning returns [to attend Jum'ah] would not unduly interfere with the inmates' practice of the Muslim religion."). The district court also engaged in this general denigration of the importance of Jum'ah, stating, "generally Muslims have opportunities similar to those of everyone

else," despite the fact that "Jews and Christians are able to attend their Sabbath services while Muslims may not. . . ." 595 F. Supp. at 935. The prison officials' interpretation of the Qur'an notwithstanding, the basic texts of Islam and 1400 years of Islamic scholarship hold just the opposite. Missing Jum'ah is patently sinful. It violates a core commandment of the Qur'an.[3/]

3/ In any event, the petitioners have no business basing their policies on an exegesis of religious authorities. Such an exercise is plainly forbidden under the Constitution. It violates the prohibition against excessive state intrusion into a religion's ecclesiastical and doctrinal affairs. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Committee for Public Education v. Nyquist, 413 U.S. 756, 797-98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); see also, Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952). Here, the LSP administration's self-serving interpre-
(footnote continued)

As set forth above, attendance at the Jum'ah service is a core religious obligation to all Muslims, commanded by the Prophet Muhammad himself. It is a central rite of Islam, equivalent in its importance to the Jewish Sabbath service and Catholic Sunday Mass. 595 F. Supp.

(footnote continued from previous page) tation of a central tenet of Islam cuts to the very heart of this prohibition, which "requir[es] on the part of all organs of government a strict neutrality toward theological questions." Abington School Dist. v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring) (emphasis added). To gainsay Islamic religious teachings, as the LSP administration has done in this case, is precisely the sort of evil James Madison contemplated, when, in his Memorial and Remonstrance against Religious Assessments, he branded the notion that "the Civil Magistrate is a competent Judge of Religious truth" as an "arrogant pretension falsified by the contradictory opinion of Rulers in all ages, and throughout the world." 2 The Writings of James Madison 183-91 (G. Hunt ed. 1901). As a matter of law, prison officials are plainly not competent to make judgments about the importance of Jum'ah to Muslims.

at 935; see also Exodus 20:8-11; Leviticus 23:1-3. Given the role of Jum'ah in Islam, the petitioners' suggestion to move the ceremony to Wednesday or Friday evenings is similar to suggesting that Jewish and Christian inmates switch their respective Sabbath services to hypothetically "more convenient" Monday or Tuesday evenings. On its face, petitioners' suggestion is offensive and absurd. As described above, Jum'ah is a unique service, the most important of the Muslim week. Its observance is strictly regulated as to day and time. The petitioners' argument is born of a fundamental ignorance of Islam. The amici here find no basis in scripture or ritual for the petitioner's argument that Jum'ah can be dispensed with or made up for on some

evening.

POINT II

PETITIONERS' JUSTIFICATIONS FOR DENIAL OF RESPONDENTS' ACCESS TO JUM'AH BETRAY ETHNOCENTRIC BIAS AND INVIDIOUS DISCRIMINATION AGAINST MUSLIMS

The petitioners advance four major arguments against allowing Muslim inmates the opportunity to celebrate Jum'ah. They argue that accommodation of the Muslim's right to celebrate Jum'ah (1) would lead to the creation of Muslim "affinity groups;" (2) would not best serve the rehabilitation of Muslim inmates; (3) would exacerbate staffing and inmate population problems; and (4) would give rise to resentment among non-Muslim inmates. As the amici show in greater detail infra, each of these arguments reflects an ethnocentric bias against Muslim inmates

which is not demonstrated against other religious groups at LSP, and constitutes discrimination against Muslim inmates.[4/]

The Equal Protection Clause prohibits the discrimination in effect here. Although the policies of petitioner may appear to be neutral on their face, they in fact burden the practice of Islam, but not of any other religion. See Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). As the amici here show infra, the policies forbidding respondents' attendance of Jum'ah are motivated by a discriminatory intent. Cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). The LSP adminstra-

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4/ The amici here address the respondents' equal protection challenge to the LSP policies at issue. This claim was raised in the district court below. 595 F. Supp. at 934-35.

tion has singled Muslim inmates out for inferior treatment, in violation of their right to equal protection of the laws. U.S. Const. amend. XIV; see Hernandez v. Texas, 347 U.S. 475, 478- 79 (1954) (although facially neutral, jury selection system unconstitutionally discriminatory where it systematically excluded a racial minority); see also Castaneda v. Partida, 430 U.S. 492 (1977) (same, where racial minority significantly underrepresented). By allowing Christian and Jewish inmates to participate in their respective sabbatical services, the petitioners have conferred a significant benefit on those inmates. Having permitted attendance at those services, LSP's inconsistent denial of the same benefit to respondents for similar Muslim services cannot survive

vigorous scrutiny. Once the state makes a benefit available, it may not grant it inconsistently. See, e.g., Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (invalidating franchise limited to property owners, lessees, and parents of school children); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (franchise, once granted, may not be limited by imposition of a poll tax); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (same, where some votes diluted by representative malapportionment). Thus, the petitioners' inconsistent and anti-Muslim bias in executing LSP policy toward religions violates the Equal Protection Clause of the Fourteenth Amendment.

At stake in this case is whether Muslim inmates shall be denied the right

to participate in one of their religion's central practices. This right is fundamental, U.S. Const. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), and, absent a compelling state interest, the state may not abridge this right. Cf. Prince v. Massachusetts, 321 U.S. 158 (1944); United States v. Reynolds, 98 U.S. 145 1878). This Court strictly scrutinizes state laws that infringe on fundamental rights. See, e.g., Dunn v. Blumstein, 405 U.S. 30 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

Moreover, strict scrutiny is demanded where state laws are based on the suspect classification of minorities. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); cf. Korematsu v. United States, 323 U.S. 214 (1944). Suspect classification includes classification based on creed. See United States v. Carolene Products Co., 304 U.S. 152-53 n.4 (1938) ("more exacting scrutiny" may be appropriate for laws "directed at particular religious . . . minorities"), citing Pierce v. Society of Sisters, 268 U.S. 510 (1925).

The justifications petitioners offer for their unequal treatment of Muslim and non-Muslim inmates are infected with invidious bias. This bias evinces an unreasonable hostility toward Islam which is not directed at the other faiths to which LSP inmates adhere. It underscores the need to closely scrutinize the LSP policies at issue in this case. Yick Wo v. Hopkins, supra, at 373 (1886).

A. Petitioners' Policy Against Predominantly Muslim Work Details Shows Clear Bigotry Against Muslims.

Although the LSP policy at issue here does not explicitly target Muslim inmates for discriminatory treatment, bias against the practice of Islam is clear from the subsidiary findings of the LSP administration that support it. Petitioners argue that allowing alternate work details is unacceptable because the predominantly Muslim work details which would be created constitute an "affinity group." Brief for Petitioners at 16, 18, 35; see also 595 F. Supp. at 933. An "affinity group" is defined as "a cohesive, organized group capable of challenging the institution." 595 F. Supp. at 933. The testimony of petitioner O'Lone makes clear that this concern with

"affinity groups" is not directed to Christians and Jews, which would be the appropriate comparison groups. Rather, he draws the comparison to such criminal groups as organized "biker" gangs. See 782 F.2d at 430 n.6.

The "affinity group" argument is clearly irrational. If seriously propounded, it would serve to bar not merely a work-detail composed of Muslim inmates, but any religious gathering of Muslim inmates as well. Yet this is not petitioners' practice. Petitioners allow Muslim inmates who are in maximum-security status (and thus would be supposed to pose greater security risks) to attend Jum'ah; they also allow Muslim inmates to rise early during the month of Ramadan to eat a communal breakfast before dawn, in or-

der to fulfill the religious obligation to refrain from eating during the daylight hours, and to participate in the twice-daily congregate prayers during that holy month. Brief for Petitioners at 16-17, 36-37, 38.

Moreover, there is no indication that the LSP administration has a similar policy against the assignment of predominantly Christian work details, or predominantly atheist work details, to prevent the formation of "affinity groups." It is unlikely that petitioners conduct any inquiry into the religious affiliations of non-Muslim inmates, much less the scrupulous examination they apply to Muslims, when work details are formed. And, of course, they allow other inmates to engage in the congregate religious

services that are mandated by their particular religions.

By failing to make the appropriate comparison with other religions, and, instead, lumping Muslim religious adherents together with "bikers" and other such groups, petitioners graphically demonstrate their bigotry against respondents. When such animus is elevated to the level of government policy it plainly cannot be countenanced. The petitioners' "affinity group" argument betrays an irrational hostility to Muslims, and the petitioners' policy to consider only the Muslim inmates' religion when assigning work details reflects an invidious bias. Yick Wo, supra, at 373-74. The "affinity group" argument, when applied against Muslims, but not against Christians and

Jews, demonstrates the petitioners' suspect classification of a minority. Skinner, supra, at 541; Carolene Products, supra, at 152-53 n.4. On this ground alone, the petitioners' denial to Muslim inmates of the right to attend Jum'ah cannot withstand an exacting constitutional review.

B. Petitioners' Determination That Preparation For A Monday-Through-Friday Work Week Is A Goal Of Rehabilitation Reflects Majoritarian And Ethnocentric Bias.

Petitioners argue that the preparation of inmates to become productive members of society requires that Muslim inmates work five full days, Monday through Friday. Weekend work is discouraged. Observance of the Muslim sabbatical service on Friday afternoons, in the petitioners' eyes, is counter-rehabilitative.

Brief for Petitioners at 12, 16-17; Brief for the United States at 4. See also 782 F.2d at 429 (Hunter, J., dissenting) ("[P]ermitting returns from civilian employment [to attend Jum'ah] would bar Muslim inmates from work experience most closely approximating life in a free society.").

This argument discloses bigotry against the commandments and mores of a minority religion. Although it is probable that the majority of Americans work from Monday through Friday, it is outrageous to assert that conformity to this majoritarian custom, if directly violative of sincerely-held religious beliefs, is a proper rehabilitative goal. Examples abound of devout believers of other faiths who are able to observe religious

tenets dissonant with majoritarian customs, and yet remain fully productive and adaptive members of a free society. Numerous studies of the Hasidic communities of Judaism testify to the adaptive ability of the religiously devout. See, e.g., L. Harris, Holy Days: The World of a Hasidic Family (1985); S. Poll, The Hasidic Community of Williamsburg (1969). See also Wisconsin v. Yoder, 406 U.S. 205, 214-16 (1972) (no legitimate state interest in compelling high school attendance of Amish children, where attendance "unnecessary" for "preparation . . . for life in the separate agrarian community that is the keystone of the Amish faith"). When religious tenets demand that the adherent resist assimilation, such communities readily develop alter-

native economic enterprises and patterns of labor. The requirement here that Muslims adopt majoritarian practices against their own religious precepts is not a proper rehabilitative goal, and unfairly deprives them of the right to practice their religion.[5/]

[5/] Petitioners' policy discourages the practice of Islam in other ways. The outside work details at LSP confer a number of benefits on LSP inmates. They "alleviate the tension produced by the presence of so many men at close quarters" within the walls of the main facility. 595 F. Supp at 931. They gradually acclimatize the inmate to life outside prison. Id. Prisoners earn the privilege of participating in the outside work details by their good behavior and conduct within LSP's walls; assignment to a work detail is in large part based on the prisoner's "institutional adjustment," his "disciplinary history," and his "attitude." Brief for Petitioners at 7. Nevertheless, gang and full minimum work detail members may not participate in Jum'ah.

The manner in which the petitioners implement their policies unconstitution-

(footnote continued)

Indeed, adherence to Islamic tenets furthers rehabilitative goals. Among American Muslim converts are many prisoners who have accepted Islam while incarcerated. In many states the number of Muslim inmates is significant. By accepting the teachings and lifestyle of Islam, these prisoners have committed themselves to a way of life that demands

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(footnote continued from previous page) ally forces the Muslim inmate to make a difficult choice. Refusal to participate in the outside work details would lead to disciplinary action. But gaining the privileged lower-security status requires that he violate the commandments of his faith. By denying to the gang minimum and full minimum inmates the opportunity to practice Jum'ah, the petitioners exert unmistakeable pressure on Muslims to give up the practice of their religion. LSP's policies force the Muslim inmates to "choose between following the precepts of [their] religion, and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion to accept work, on the other hand." Sherbert v. Verner, 374 U.S. 398, 404 (1963).

sincere belief and righteous behavior. Islam is a highly moralistic religion that requires its followers to honor life, their fellow human beings, and themselves. Muslims are enjoined not to lie or cheat, not to drink or take drugs, and not to hurt or harm any human being without just cause. Islam also places a great value on self- reliance, on supporting oneself as opposed to begging and depending on others. In light of this, an inmate's adherence to the basic morality of Islam advances, rather than hinders, the prison administration's interests in security, order, and rehabilitation. Thus, it is consonant with the interests of petitioners to allow Muslim inmates to practice Islam and participate in its central rites.

C. Petitioners' Asserted Inability To Find The Resources To Permit Muslims To Attend Jum'ah, While Finding Resources To Allow Other Religious Services To Be Held, Demonstrates Invidious Bias Against Muslims.

Although, in petitioner O'Lone's words, the petitioners "are constantly shuffling inmates and staff in [LSP] to meet our needs," Tr. 199, they suddenly lose their flexibility when the respondents seek to attend Jum'ah. The petitioners' numerous avowals of logistical impossibility, where accommodation of the sabbatarian needs of Muslim inmates is concerned, amount to a denial of the Muslims' right to equal protection of the law.

For example, the petitioners argue that restriction of the Muslim inmates' right to attend Jum'ah services on Friday

afternoons results from the large number of maximum security inmates inside LSP's main facility during the weekday. Brief for Petitioners at 14. They argue that security considerations, and the "pressures" of a large inmate population, direct that as many inmates as possible be kept out of the "max" compound during weekdays. Id. at 15. However, these problems somehow vanish over the weekend, when, according to petitioners, virtually all LSP inmates remain inside the main facility and staff coverage is less comprehensive. Id. at 16. Petitioners do not contend that on Saturdays or Sundays, when the main facility is most crowded, it is administratively inconvenient, or logistically impossible, to permit Christian and Jewish inmates to attend their

respective Sabbatical services. 595 F. Supp. at 934-35.

Further, although the petitioners are willing to make the significant staffing arrangements which must be required to allow for religious services for Christians and Jews on the weekends, as described above, they refuse to make even minimal adjustments in the assignment of work details to permit Muslim inmates to remain faithful to the commandments of their religion and also fulfill their work requirements. The petitioners' refusal comes despite a past history of alternate work assignments for Muslim inmates on Fridays which posed no real problems for them.

The petitioners' bland assertion of logistical impossibility when it comes to

making suitable staffing arrangements for Muslims, coupled with their willingness to undertake the administrative exertions necessary to enable non-Muslim sabbatical services to go forward, seems to be the result of the petitioners' subjective and pernicious bias against Muslims.

D. Petitioners' Selective Sensitivity To Possible Non-Muslim Perceptions Of "Favoritism," And Insensitivity To Muslim Perceptions Of Actual Discrimination, Evidence Anti-Muslim Bias.

If there is accommodation of the gang minimum and full minimum Muslim inmates' religious need to attend Jum'ah, the petitioners argue, non-Muslim inmates may get the "impression" that the prison authorities are showing "favoritism" to the Muslims. Petitioners assert that this may create "resentment" in the general inmate population. See, e.g., Brief

for Petitioners at 16, 18, 34; see also 595 F. Supp. at 933.

This argument proves too much. The petitioners have already equated predominantly Muslim work groups with outlaw "biker" gangs; they have shown administrative inertia where Jum'ah is concerned, but not when comparable Christian and Jewish services are held; they have held, as a matter of policy, that obedience to the Islamic commandment to attend Jum'ah interferes with the Muslim inmate's rehabilitation into a productive member of society; they have rendered a self-serving interpretation of Islamic scriptures, to the effect that the Qur'an and 1400 years of Qur'anic scholarship are wrong about the significance, day, and time of Jum'ah; they blithely suggest that Mus-

lims violate their commandments and move the Jum'ah prayer to a day and time more convenient to the LSP administration. The petitioners' arguments, policies, and practices at issue exhibit a breathtaking amount of bigotry against Muslims and a studied ignorance of Islam. And yet, petitioners seek scrupulously to avoid hurting the feelings of the non-Muslim inmates.

Far from discouraging the perception of "favoritism," LSP's current policy announces, in stentorian tones, its preference of non-Muslim religious groups at the expense of Muslim inmates. In the context of this case, petitioners' asserted concerns about non-Muslim "impressions" of "favoritism", and about the possible "resentment" of the non-Muslim

inmates, merely reiterate in new terms the underlying theme of their other arguments. The LSP administration favors the feelings of non-Muslims over the feelings of Muslims.

LSP's accommodation of the sabbatarian needs of non-Muslim inmates, and its simultaneous disregard for the requirements Islam makes of its adherents, undoubtedly occasion the Muslim inmates' perception of administrative "favoritism". The consequent potential for resentment is at least as great as that posed by non-Muslims who hypothetically might see Jum'ah as the means of "escaping" LSP's "rigorous outside work assignments" for about one hour per week. Cf. Brief for Petitioners at 16, 18.

In view of this, it is almost redun-

dant to point out that potential majoritarian "resentment" can be invoked as the justification for denying any minority group the equal protection of the law or the exercise of basic rights. It is intellectually dishonest to assert that accommodation amounts to favoritism. As state officials, petitioners should not lend their authority to this notion.

Examined in light of the foregoing, petitioners' avowed concerns for maintaining security and for promoting rehabilitation, and their flat assertions of physical impossibility when those arguments are unavailing, are specious. Like Proteus, the LSP administration's policy considerations change, depending on the religion of the inmate involved. Thus, for example, prison overcrowding,

and the security problems it poses, are LSP's primary concern on Fridays, when the time for Jum'ah falls. Brief for Petitioners at 15. On Saturdays and Sundays, when the prison is most crowded, and when the Jewish Sabbath and Christian Sunday services occur, LSP's principal concern becomes prison "idleness." Brief for Petitioners at 16. When Muslims propose alternate weekend work details to make up for time missed for Jum'ah, LSP's principal concern ceases to be "idleness," and becomes the fear of predominantly Muslim work details. The fear of non-Muslim "resentment" of "favoritism" adds piquancy to all the above concerns.

The Equal Protection Clause of the Fourteenth Amendment directs the strict scrutiny of petitioners' discriminatory practices. Furthermore, a fundamental constitutional right, the right to practice religion, is at stake here. Therefore, in this case, the Court has a duty to carry its analysis beyond mere deference to the judgment of prison officials; it must examine LSP's practices closely. See Procunier v. Martinez, 416 U.S. 396, 405-06 (1973); Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam); Johnson v. Avery, 393 U.S. 483, 486 (1969). Petitioners' practices deny inmates the right

to practice their religion. They are based on a body of policy betraying invidious hostility to the minority of Muslim inmates incarcerated at LSP. They are explained by constantly changing and inconsistently invoked administrative concerns. They deny respondents and other Muslim inmates equal protection of the laws.

CONCLUSION

For the foregoing reasons, the amici urge the Court to affirm the decision of the Third Circuit below, and to resolve this case in a manner that directs the accommodation of the respondents' and

other Muslim inmates' religious needs, and that is not burdensome to the practice of the Islamic service of Jum'ah.

Respectfully submitted,

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